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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF POSITION OF PETITIONER, ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE

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CERTIORARI GRANTED APRIL 15, 1963

METROPOLITAN PRESS [redacted] SEATTLE, WASH.

IN THE

Supreme Court of the United States

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To the Honorable Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States

AMERICAN MERCHANT MARINE INSTITUTE, INC., a nonprofit New York membership corporation, PACIFIC AMERICAN STEAMSHIP ASSOCIATION, a nonprofit California corporation, and LAKE CARRIERS' ASSOCIATION, a voluntary association, do hereby respectfully move for leave to file a brief as *amici curiae* in support of the position of the shipowner and petitioner, Italia Societa Per Azioni Di Navigazione, on Petition for Certiorari as granted April 15, 1963 in this cause.

Petitioner has consented to the filing of this *amici curiae* brief, but such consent, when sought from the respondent, Oregon Stevedoring Company, under the provisions of Supreme Court Rule 42, has been refused by counsel for the respondent (see Appendix).

AMERICAN MERCHANT MARINE INSTITUTE, INC. has a membership of 41 steamship companies oper-

ating cargo, tanker, collier and passenger vessels under the American flag. These companies have a total vessel tonnage of more than 5,698,000 gross tons, representing about 57 per cent of the American Flag merchant marine operating in foreign and domestic trades.

PACIFIC AMERICAN STEAMSHIP ASSOCIATION is a nonprofit corporation, organized under the laws of the State of California. Its members own and operate merchant vessels under the American flag, having a total tonnage of approximately 1,000,000 gross tons. These vessels constitute over 90 per cent of all domestic merchant vessels now in service whose owners have headquarters on the Pacific Coast.

LAKE CARRIERS' ASSOCIATION is a voluntary organization of owners and operators of vessels under the American flag engaged in commerce on the Great Lakes. It has 25 member companies with 241 merchant vessels presently enrolled in the Association. These vessels have an aggregate of more than 1,870,000 gross tons, constituting 97 per cent of all commercial vessels under the American flag now engaged in domestic commerce on the Great Lakes.

Moving parties are interested in the outcome of this case because of the very important question presented as to the basis for recovering indemnity between shipowners and independent contractors such as stevedores, ship repair yards, suppliers or servicemen for amounts which the shipowner or operator may be initially held liable to pay by way of damages to seamen, longshoremen or any other persons entitled to the benefit of a warranty of seaworthiness from the shipowner-operator.

The moving parties are concerned with the impact of the decision in this case on the entire steamship industry. The issue relates to whether independent contractors will be allowed to avoid ultimate intrinsic responsibility for indemnity on damages awarded to seamen, longshoremen or others against shipowners or operators where the cause of the injury is defective equipment or material supplied, brought aboard vessels and used by such independent contractors.

If the decision of the Court of Appeals for the Ninth Circuit in this case is affirmed, it would seriously impair the recovery of indemnity by shipowners from independent contractors where the shipowner's initial liability is based upon breach of the warranty of seaworthiness without negligence or fault upon the part of the shipowner-operator.

The moving parties believe that the Court of Appeals for the Ninth Circuit, by a divided panel (2 to 1), has failed to properly construe several recent decisions of this Court regarding a stevedore's or contractor's implied warranty of workmanlike service[1] by improperly attaching to this implied warranty an unjustified and unintended condition that the shipowner-operator must prove negligence of the independent contractor before it is entitled to recover indemnity for losses and damages that the shipowner-operator has initially been required to bear because of its absolute liability under the seaworthiness warranty.[2]

---

[1] *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124; *Weyerhaeuser SS Co. v. Nacirema Operating Co.*, 355 U.S. 563; *Waterman SS Corp. v. Dugan & McNamara*, 364 U.S. 421.

[2] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85.

The moving parties intend in their brief to support the position of the shipowner as petitioner herein by citation of authorities relating to the origin and development of the implied warranty of workmanlike service which has been likened to a manufacturer's warranty of soundness of its product.[3] The moving parties also intend to analyze in their *amici curiae* brief the more logical reasoning of the Court of Appeals for the Second Circuit in *Booth SS Co. v. Meier & Oelhaf*, 282 F.2d 310 (CA 2, 1958) and in the dissenting opinion for the Court of Appeals for the Ninth Circuit in the present case. 310 F.2d 481, 488 (R. 54-63). In addition, *amici curiae* will undertake to show that the result of the decision of the Court of Appeals for the Ninth Circuit is inequitable and that a stevedore or other independent contractor, who supplies equipment or material which it brings aboard a vessel and which subsequently fails and causes injury while being used by the contractor, should be the party to bear the ultimate financial burden, rather than the shipowner-operator, who has not been guilty of any negligence with respect to the installation and use of such equipment or material by the contractor.

The moving parties expect that, while petitioner will present a carefully prepared brief in support of its position, its brief will be directed primarily to the facts in this particular case. The moving parties feel that they are in the best position as *amici curiae* to represent and bring to the attention of this Court the viewpoint and position of a major segment of all shipowners and operators and to demonstrate to this Court the serious impact

[3] *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124, 142.

of the decision upon the entire merchant marine industry.

Based upon the above, it is respectfully requested that this Motion for Leave to File *Amici Curiae* Brief be granted under the provisions of Rule 42 of Supreme Court General Rules, a copy of said brief being attached to this Motion.

Respectfully submitted,

J. WARD O'NEILL
CHARLES B. HOWARD
Counsel for Amici Curiae

c/o SUMMERS, HOWARD & LE GROS
840 Central Building
Seattle 4, Washington

Of Counsel
SCOTT H. ELDER
J. STEWART HARRISON

CERTIFICATE OF SERVICE

I, CHARLES B. HOWARD, one of counsel for American Merchant Marine Institute, Inc., Pacific American Steamship Association and Lake Carriers' Association, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 19th day of August, 1963, I served copies of the foregoing Motion for Leave to File *Amici Curiae* Brief on counsel for all parties of record by mailing copies of said Motion, with copies of *Amici Curiae* Brief attached, in sealed envelopes, deposited in the U.S. mail at Seattle, Washington, with postage prepaid and addressed as follows:

Erskine B. Wood
Wood, Wood, Tatum, Mosser & Brooke
1310 Yeon Building
Portland 4, Oregon

Floyd A. Fredrickson
Gray, Fredrickson & Heath
1021 Equitable Building
Portland 4, Oregon

CHARLES B. HOWARD
840 Central Building
Seattle 4, Washington

APPENDIX

(Letterhead of)

WOOD, WOOD, TATUM, MOSSER & BROOKE

August 2, 1963

Subject: United States Supreme Court
Italia Societa v. Oregon
Stevedoring Co., October Term,
1963, No. 876

Charles B. Howard, Esq.
Summers, Howard & LeGros
Central Building
Seattle 4, Washington

J. Ward O'Neill, Esq.
Haight, Gardner, Poor & Havens
80 Broad Street
New York 4, N.Y.

Gentlemen:

This letter will confirm that on behalf of petitioner, Italia Societa per Azioni di Navigazione, we hereby consent to the filing of a brief amicus curiae in this case on behalf of associations of American steamship owners, including the American Merchant Marine Institute and the Pacific American Steamship Owners Association.

Very truly yours,

ERSKINE B. WOOD
Counsel for Petitioner
Italia Societa

EBW/rjk

(Letterhead of)

GRAY, FREDRICKSON & HEATH

July 24, 1963

Charles B. Howard, Esq.
840 Central Building
Seattle 4, Washington

Dear Sir:

We acknowledge receipt of your telegram dated July 24, 1963, requesting leave to file a brief amicus curiae on behalf of various associations of American steamship owners in the case of Italia Societa Per Azioni de Navigazione vs. Oregon Stevedoring Company, Inc. now pending in the United States Supreme Court on writ of certiorari.

This will confirm our telephone advice to you of yesterday that we are unable to consent to your request.

Very truly yours,
WENDELL GRAY

WG:js

IN THE

Supreme Court of the United States

October Term, 1962

No. 876

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,
Respondent.

BRIEF ON BEHALF OF AMERICAN MERCHANT MARINE INSTITUTE, INC., PACIFIC AMERICAN STEAMSHIP ASSOCIATION and LAKE CARRIERS' ASSOCIATION AS AMICI CURIAE

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BRIEF ON BEHALF OF AMERICAN MERCHANT MARINE INSTITUTE, INC., PACIFIC AMERICAN STEAMSHIP ASSOCIATION and LAKE CARRIERS' ASSOCIATION AS AMICI CURIAE

I.

STATEMENT OF INTEREST

AMERICAN MERCHANT MARINE INSTITUTE, INC., has a membership of 41 steamship companies operating cargo, tanker, collier and passenger vessels under the American flag. These companies have a total vessel tonnage of more than 5,698,000 gross tons, representing about 57 per cent of the American Flag merchant marine operating in foreign and domestic trades.

PACIFIC AMERICAN STEAMSHIP ASSOCIATION is a nonprofit corporation, organized under the laws of the State of California. Its members own and operate merchant vessels under the American flag, having a total tonnage of approximately 1,000,000 gross tons. These vessels constitute over 90 per cent of all domestic merchant vessels now in service whose owners have headquarters on the Pacific Coast.

LAKE CARRIERS' ASSOCIATION is a voluntary organization of owners and operators of vessels under the American flag engaged in commerce on the Great Lakes. It has 25 member companies with 241 merchant vessels presently enrolled in the Association. These vessels have an aggregate of more than 1,870,000 gross tons, constituting 97 per cent of all commercial vessels under the American flag now engaged in domestic commerce on the Great Lakes.

The members of the aforementioned groups as *amici curiae*, and all other shipowners-operators, will be directly affected by the decision in this case because of the frequent necessity in routine and normal operations of employing third party-independent contractors, such as stevedore companies, ship repair companies or other ships' service or supply companies, to perform services and provide equipment and materials for use by such contractors in operations aboard merchant vessels.

For example, statistics supplied by the New York Shipping Association show that in the contract year October 1, 1961, to September 30, 1962, there were 42,023,096 man-hours of labor performed by harbor workers aboard vessels in the Port of New York. Of these, 32,774,265, or 78 per cent, were performed by employees of independent contractors.

By contract and custom, equipment or materials supplied and brought aboard by such independent contractors are frequently used exclusively by the contractors' employees under their direct supervision. Shipowners and operators have little or no opportunity to inspect and test the equipment or material for the failure of which they

may be held legally liable. If such equipment or materials, when brought aboard merchant vessels by third parties as independent contractors, are defective and cause personal injuries to seamen, longshoremen, ship repairmen or other workers engaged in work traditionally performed by seamen, these persons may be entitled to recover damages from the shipowner or operator on the basis of the absolute warranty of seaworthiness, even though there is no negligence on the part of the shipowner or operator.[1]

The question which concerns *amici curiae* in this case is whether a stevedoring company, or other independent contractor supplying equipment or material for use aboard a vessel, breaches its implied warranty of workmanlike service when it supplies latently defective equipment or material which is used in performance of the contractor's services, although there is no proof that the contractor has been negligent.

In considering this question on the basis of the present record, the following factors are pertinent:

(1) The equipment or material is supplied and used aboard the vessel by the stevedore or other independent contractor (Finding of Fact (16) and (17) R. 25);

(2) The defect in the equipment or material is latent, not patent (Finding of Fact (21) R. 26);

(3) The stevedore or other independent contractor supervises and performs the operations being conducted on the vessel when the accident causing injuries occurs (Finding of Fact (18) R. 25);

(4) The shipowner-operator is not guilty of any negligence in connection with the operation involving

[1] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Alaska SS Co. v. Petterson*, 347 U.S. 396 (1954).

use of the latently defective equipment or material;

(5) The stevedore or other independent contractor is not negligent in supplying the latently defective equipment or material (Finding of Fact (22)-R. 26).

II.

SUMMARY OF AMICI CURIAE ARGUMENT

It is the position of *amici curiae* that, where an independent contractor, such as the respondent stevedore company herein, has impliedly warranted its performance of workmanlike service aboard a vessel, this includes the obligation to provide adequate and proper equipment and material to be used in performance of the contractor's work. If the independent contractor supplies equipment or material that is latently defective and causes injuries for which the shipowner-operator becomes initially liable under its seaworthiness warranty to seamen, longshoremen or others, then we submit that the law relating to such implied warranty entitles the shipowner-operator to recover full indemnity from the contractor, even though the independent contractor has not been found to be negligent.

The above position is sound, not only upon the basis of a proper application of the law as it has developed relating to warranties but also, upon the basis of equities between the parties and the placement of the ultimate intrinsic loss or responsibility upon the party who furnishes and uses the defective equipment or material that causes such an injury. Any contrary result would be both unjust and inequitable.

This is particularly true in many cases where the injured

party is an employee of the independent contractor supplying the defective equipment or material causing injuries aboard a vessel. The employer in such cases is immune from direct liability to its employee for damages by reason of the provisions of the Longshoremen's and Harbor Workers' Compensation Act,[2] which limit the employer's obligation to the providing of compensation and medical benefits.

III.

ARGUMENT

PROOF OF NEGLIGENCE IS NOT REQUIRED IN IMPLIED WARRANTY CASES

A. Discussion of Effect of Other Recent Decisions Involving Implied Warranty in Shipowners' Actions for Indemnity.

In 1958, the Court of Appeals for the Second Circuit decided *Booth SS Co. v. Meier & Oelhaf Co.*, 262 F.2d 310. An independent ship repair company contracted to replace defective cylinder liners in a vessel's diesel engine. During the removal of the cylinder liners, a wire strap parted, permitting a strongback to fall and injure an employee of the ship repair company. The evidence at the trial disclosed that the accident was not caused by the negligence of any of the parties but resulted solely from a *latent defect* in the wire strap. The trial court dismissed the shipowner's claim for indemnity against the ship repair company, holding that, failing proof of negligence, the shipowner could not recover from the repair company. In reversing the trial court, the Court of Appeals held that, where the contractor undertook to do the work of repair on the vessel's engines and supplied the equip-

[2] Title 33 U.S. Code §§ 901-950.

ment which failed in the course of the use for which it was supplied, this failure constituted a breach of the contractor's implied warranty of workmanlike service described by this Court in *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U.S. 124 (1956). The Court of Appeals therefore held that the shipowner could recover full indemnity without proving negligence of the ship repair company.

This decision stood unchallenged until, in the instant case, the Court of Appeals for the Ninth Circuit, by a divided panel of the court (R. 43-64),[3] specifically rejected the holding in *Booth* and held that the warranty of workmanlike service could not be breached without some negligence on the part of the independent contractor. In a strong dissent (R. 54), Judge Jertberg quoted extensively from, and would have followed, the unanimous decision in the *Booth* case and the reasoning of this Court in the *Ryan* case.

In both *Booth* and the instant case, the appellate courts conceded that, as of the time of their respective decisions, there were no other cases directly in point.

Most recently, however, this Court, in *Reed v. S.S. YAKA*, 373 U.S. 410 (1963), spoke unequivocally on the issue. The trial court had found that the sole cause of injury to plaintiff, a longshoreman, was a *latent defect* in a pallet supplied by his employer, who was also the bareboat charterer of the vessel. In reversing the holding of the Court of Appeals that plaintiff's sole remedy was under the Longshoremen's and Harbor Workers' Compensation Act, this Court first noted at 373 U.S. 410,

[3] 310 F.2d 491.

"The district judge found that at the time of the injury petitioner was in the ship standing on a stack of rectangular, wooden pallets used in loading the vessel and that the sole cause of the injury was a latent defect in one of the planks of a pallet, which caused it to break."

Then at 414:

"Thus, there can be no doubt that, if the petitioner here had been employed to do this particular work by an independent stevedoring company rather than directly by the owner, he could have recovered damages for his injury from the owner who could have then under *Ryan* shifted the burden of the recovery to petitioner's stevedoring employer."

The Court further noted:

"In making this argument, Pan-Atlantic has not and could not point to any economic difference between giving relief in this case, where the owner acted as his own stevedore, and in one in which the owner hires an independent company. In either case, under *Ryan*, the burden ultimately falls on the company whose default caused the injury."

The Court of Appeals' decision in the instant case predates this Court's decision in *Reed* and is the first attempt to limit a stevedore's implied warranty of workmanlike service by requiring a showing of negligence to constitute a breach of the warranty. As noted in Judge Jertberg's dissent, none of the prior Supreme Court cases "exclude the existence of liability without fault as an element of the warranty of workmanlike service under the facts of this case." 310 F.2d at 491 (R. 61).

The decision under review is based on definitions of the word "workmanlike," which the Court of Appeals equated to all words which connote a standard of skill

similar to that associated with the reasonable man test for negligence.

The Court below has apparently confused the *nature* of the stevedore's duty with the *standard* to be observed under that duty. A comparison of the stevedore's warranty with the shipowner's warranty of seaworthiness is illuminating and relevant for the two are "corollary" doctrines. *De Gioia v. United States Lines Co.*, 304 F.2d 421 (CA 2d, 1962).

In *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960), it was contended that a transitory condition, of which the shipowner had no knowledge, did not make a vessel unseaworthy. This Court rejected the contention upon an analysis of the nature of the duty and the standard to be applied thereunder. In discussing the *Sieracki* case, this Court state., 362 U.S. at 549:

> "The character of the duty, said the Court is 'absolute.'"

Later in the opinion, the Court discussed the standard under that duty and said at 550:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suited for her intended service."

This characterization is equally applicable to the corollary doctrine of the implied warranty of workmanlike service, i.e., the stevedore's duty is absolute and the

standard is that of reasonable fitness for the intended purpose. Thus, as the shipowner in *Alaska SS Co. v. Petterson, supra*, was held absolutely liable because certain stevedore gear or equipment was not reasonably fit, so too should the stevedore be absolutely liable in indemnity since its obligation is co-extensive with that of the shipowner with respect to the stevedore's own equipment.

B. History and Development of Law Relating to Manufacturer's Warranty of Products.

In the case of *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*,[4] this Court first described in broad outline the shipowner's right to recover full indemnity on the theory of breach of implied warranty. In the process, it likened the stevedore's warranty of workmanlike service to a manufacturer's warranty of its product, stating at pages 133-134:

> "This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. *It is petitioner's warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.* The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service." (Emphasis added)

Later, in describing the stevedore's implied warranty, this analogy has been reaffirmed several times.[5]

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[4] 350 U.S. 124 (1956).

[5] *Crumady v. The J. H. Fisser*, 358 U.S. 423, 428-429 (1959); *Waterman SS Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, 424 (1960); *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 358, Note 1 (1962).

This Court has also pointed out that in the area of contractual indemnity, "application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate."[6]

An analysis of the law concerning a manufacturer's warranty of the fitness of its product establishes that one of the earliest exceptions recognized to the rule of *caveat emptor* was in the situation where the manufacturer had knowledge of the specific use to which its product was to be put. Under such circumstances, the manufacturer was held to have warranted the fitness of his manufactured product and was responsible even for latent defects.[7]

In *Tennessee River, etc., Co. v. Reeds, Id.*, a cast iron piston head had been ordered from the defendant manufacturer to replace a broken one which the manufacturer had made. The new piston head was apparently perfect, but in about two months it broke and the casting was later discovered to have contained blowholes which could not have been detected by observation or test. The trial court instructed the jury on the theory of due care owed by the manufacturer. In its opinion, the Supreme Court of the State of Tennessee stated at page 390:

> "This charge is erroneous. It assumes the nonliability of a manufacturer for latent defects, if proper tests had been applied to the discovery of such defects by him, and they had not been found. This . . . is not the rule as applied to the manufacturer who makes and sells to a purchaser machinery for a special purpose. In that case the manufacturer warrants against

[6] *Weyerhaeuser SS Co. v. Nacirema Operating Co.*, 355 U.S. 563, 569 (1958).

[7] *Randall v. Newsom*, 2 Q.B.D. 102 (1877); *Rodgers v. Niles*, 78 Am. Dec. 290, 294, 295 (Ohio, 1860); *Tennessee River, etc., Co. v. Reeds*, 37 S.W. 389 (Tenn., 1896).

> latent defects that the machinery is reasonably fit for the use to which it is to be applied. He does not warrant (in the absence of express contract) that it is perfect, or the best for that purpose, but only that it is reasonably fit and proper for the use designed."

The implied warranty of fitness of a product for specific use as developed by the common law was later adopted into Section 15 of the Uniform Sales Act, but the warranty is not confined solely to sales transactions.[8] As the confines of warranty liability continued to expand, it was pointed out by one commentator as early as 1951 that:

> "We are all used to the fact that implied warranties of fitness have for some time involved absolute liability without fault between persons in direct contractual relationships, although we might not have thought of it as such."
>
> Gregory, *Trespass to Negligence to Absolute Liability*, 37 Virginia Law Review 359, 384.

By 1955, the most prominent authority in the field of tort law stated that courts had established that a breach of warranty action gave rise to strict liability which was not dependent upon any knowledge of defects on the part of a seller, or upon proof of negligence. Prosser on Torts (2d Ed. 1955) § 83.—*Suppliers of Chattels*, page 494.

The application of strict liability in warranty actions has accelerated as our economic structure continues to grow more complex and the accident toll of modern life continues to increase. Textwriters and commentators agree that it is now well settled that concepts of negligence and

[8] Annotation at 68 A.L.R. 2d 850, 854; *Eastern Motor Express, Inc., v. A. Maschmeijer, Jr., Inc.*, 247 F.2d 826 (CA 2d, 1957); *Aced v. Hobbs-Sesack Plumbing Co.*, 360 P.2d 897 (Cal., 1961); *Greenman v. Yuba Power Products Co.*, 377 P.2d 897 (Cal. 1962).

fault as defined by negligence standards have no place in such suits.[9]

Currently, the overwhelming weight of judicial opinion makes it clear that proof of negligence is unnecessary to establish liability for breach of the manufacturer's implied warranty. Illustrative of the products, equipment or material where such rule has been heretofore applied in numerous jurisdictions are the following cases:

CA 2 1958	*Booth SS Co. v. Meier & Oelhaf Co.*, 262 F.2d 310	Wire strap
CA 6 1962	*Hessler v. Hillwood Manufacturing Co.*, 302 F.2d 61	Concrete nail
CA 6 1960	*Hansen v. Firestone Tire & Rubber Co.*, 276 F.2d 254	Tire
D. Maine 1960	*In re Belle-Moc, Inc.*, 182 F. Supp. 429	Shoe lasts
D. Colo. 1954	*Senter v. B. F. Goodrich Co.*, 127 F. Supp. 705	Tire
Cal. 1962	*Greenman v. Yuba Power Product, Inc.*, 377 P.2d 897	Home power tool
Cal. 1960	*Gottsdanker v. Cutter Laboratories*, 182 Cal. App.2d 602	Polio vaccine
Cal. 1960	*Peterson v. Lamb Rubber Co.*, 353 P.2d 575	Grinding wheel
Florida 1963	*Green v. American Tobacco Co.*, 154 So.2d 169	Cigarettes
Iowa 1961	*State Farm Mutual Automobile Ins. Co. v. Anderson-Weber, Inc.*, 110 N.W.2d 449	Automobile wiring

[9] See: James, *Products Liability—Implied Warranties*, 34 Texas Law Review 192 (1955); Annotations in 78 A.L.R.2d 460, 475, 491, 493 and 79 A.L.R.2d 431, 439; Keeton, *Products Liability —Current Developments*, 40 Texas Law Review 193 (1961); Roberts, *Implied Warranties—The Privity Rule and Strict Liability*, 27 Missouri Law Review 194 (1962); 1 Hursh, *American Law of Products Liability*, § 3.1, pages 407, 408 (1961).

Kansas 1921	*American Tank Co. v. Revert Oil Co.* 196 Pac. 1111	Oil tank
Maine 1960	*Hadley v. Hillcrest Dairy, Inc.*, 171 N.E.2d. 293	Milk bottle
Mich. 1961	*Manzoni v. Detroit Coca-Cola Bottling Co.*, 109 N.W.2d 918, 920, 922	Coca Cola
Nebr. 1957	*Brown v. Globe Laboratories*, 84 N.W.2d 151	Sheep bacterin
New Jer. 1960	*Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69	Automobile steering
New York 1963	*Goldberg v. Kollsman Instrument Corp.*, *et al.*, 240 N.Y.S.2d 592	Airplane
Ohio 1951	*Di Vello v. Gardner Machine Co.*; 102 N.E.2d 289	Grinding wheel
Penn. 1959	*Jarnot v. Ford Motor Co.*, 156 A.2d 569	Truck steering
Texas 1942	*Jacob E. Decker v. Capps*, 164 S.W.2d 828	Sausage
Vermont 1953	*Green Mountain Mushroom Co. v. Brown*, 95 A.2d 678, 681	Roofing cement

Some courts have expressed the principle in different terms by holding that evidence of lack of negligence is completely immaterial for defense purposes.[10]

One leading text on the subject has recently pinpointed the question here involved and has stated the rule as follows:

"§ 16.01 Warranty and Negligence Distinguished

"[1] In general, the liability in negligence of a manufacturer or other supplier for damage caused

[10] *Rasmus v. A. O. Smith Corp.*, 158 F. Supp. 70 (N.D. Iowa, 1958); *Keyser v. O'Meara*, 165 Atl. 793 (Conn., 1933); *Ver Steegh v. Flaugh*, 103 N.W.2d 718 (Iowa, 1960); *Simmons v. Wichita Coca Cola Bottling Co.*, 309 P.2d 633 (Kan., 1957); *Snead v. Waite*, 208 S.W.2d 749 (Ky., 1948); *Gilbert v. John Gendusa Bakery, Inc.*, 144 So.2d 760 (La., 1962); *Lundquist v. Coca Cola Bottling, Inc.*, 254 P.2d 488 (Wash., 1953).

by his product is based on the supplier's failure to exercise reasonable care. Hence, negligence is a tort concept based on fault.

"Although the courts are occasionally confused about the matter, warranty, on the other hand, is not a concept based on fault or on the failure to exercise reasonable care. But this does *not* mean that warranty is necessarily contractual or nontortious in nature. Liability in warranty arises where damage is caused by the failure of a product to measure up to express or implied representations on the part of the manufacturer or other supplier. Accordingly, an injured person is not required to prove negligence in a warranty-products liability case. Similarly, evidence offered *solely* for the purpose of showing lack of negligence in manufacture is inadmissible in a warranty action because liability is imposed in such actions notwithstanding the exercise of due care. In short, liability in warranty is strict if a breach thereof is proved."

1 Frumer & Friedman, *Products Liability*, (1961) § 16.01 [1] pp. 358, 360.

Just as the case of *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (Mass. 1916), was a landmark in the area of manufacturers' liability for negligence, the case of *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J., 1960), is regarded as the leading case in the area of manufacturers' liability for breach of implied warranty. In *Henningsen, supra*, the court was called upon to decide whether the purchaser of a new automobile could recover on the theory of implied warranty for injuries sustained by his wife when the car suddenly went out of control and crashed from some undetermined failure of its steering or other mechanical parts. The contract of sale had certain limited express warranties of the manufacturer and dealer and undertook to disclaim any further implied

warranty or liability. There was no proof of negligence of the manufacturer or dealer. In an action against both, the court, after an exhaustive review and analysis of the decisions relating to implied warranties, held that the purchaser and his wife could recover against both manufacturer and dealer, regardless of any lack of privity. Thus, while the courts have been slower to abolish the requirement of privity in the area of implied warranty, the result is now the same as in the field of negligence.[11]

In the instant case, the petitioner is in direct privity with the respondent stevedore and is entitled to recover full indemnity on the ground that the stevedore's implied warranty of the fitness of its equipment and material is co-extensive with the shipowner's warranty of seaworthiness.[12] It is an absolute duty to furnish equipment which is reasonably fit for the intended usage. *Mitchell v. Trawler Racer*, 362 U.S. 539 (1960).

INDEPENDENT CONTRACTOR SHOULD BEAR ULTIMATE RISK OF LOSS. OPPORTUNITY TO INSPECT AND EXPERTISE

Despite the statement in the majority opinion of the Court below to the contrary, there are strong policy reasons for imposing indemnity liability on a stevedore when a latent defect in equipment or material it has supplied and used aboard a vessel has cast a shipowner in damages. Under *Alaska SS Co. v. Petterson, supra*, note 1, the protection of the warranty of seaworthiness was extended to

[11] See: Prosser, *The Assault Upon the Citadel*, 69 Yale Law Journal 1099 (1960); Roberts, *Implied Warranties—The Privity Rule and Strict Liability*, 27 Missouri Law Review 194 (1962).

[12] See: *Shamrock Towing Co. v. Fichter Steel Corp.*, 155 F.2d 69 (CA 2d, 1946); *Mickle v. M/V H. W. Schulte*, 188 F. Supp. 77 (N.D. Calif., 1960).

cover defective gear or equipment brought aboard by an independent contractor. Now, under *Reed v. SS YAKA*, 373 U.S. 410, "the burden ultimately falls on the company whose default caused the injury." *Id.* at 414. The soundness of this policy was set forth in detail in *Booth SS Co. v. Meier & Oelhaf, supra*, with respect to equipment supplied and used exclusively by an independent contractor. The Court stated at 314:

> "In such circumstances the hirer defers to the special qualifications of the contractor in both the selection and use of the equipment. Relying on the supplier's control of the work and with confidence in the supplier's expert knowledge and competence, he makes at most only a routine inspection of the equipment employed.
>
> "Such latent defects in wire as are undetectable on visual inspection may result from improper manufacture or from fatigue resulting from use over a period of time. They may perhaps be discovered by subjecting the equipment to appropriate tests with safety factors in excess of the contemplated undertaking. Furthermore, it is the supplier and not the shipowner who knows the actual history of prior use of the equipment. He alone is in the position to establish such retirement schedules or periodic retests as will best prevent the development of visually undetectable flaws."

As Judge Jertberg pointed out in his dissenting opinion in the Court below at 310 F.2d 491 (R. 60, 61):

> "Since the loss must be borne by either one or the other, it is not unfair that such loss be ultimately borne by the one best able to eliminate the hazard, to wit, the owner of the defective gear, or equipment who supplied it and whose use and control over it was exclusive."

To the same effect was the statement of the Court in

De Gioia v. United States Lines Co., 304 F.2d 421, 426 (CA 2d, 1962):

> "The function of the doctrine of unseaworthiness and the corollary doctrine of indemnification is allocation of the losses caused by shipboard injuries to the enterprise, and within the several segments of the enterprise, to the institution or institutions most able to minimize the particular risk involved."

The fairness of such a policy is self-evident. There is neither precedent nor valid argument against it and to abort the logical development of the implied warranty of workmanlike service in this case would be unjust and without reason. Moreover, to compensate the injured longshoreman is only half the battle. The ultimate goal, prevention of accidents, can best be achieved when responsibility for the condition of equipment or material is borne by the party who supplies and uses it.

IV.

CONCLUSION

Sound and logical application of the law of implied warranty does not require proof of negligence to entitle a shipowner to recover full indemnity from an independent contractor who supplies latently defective equipment and materials. This is entirely consistent and in harmony with this Court's several recent expressions as to the scope and extent of the shipowner-operator's right to recovery of indemnity. It is also consistent with the proper allocation of risks as between two otherwise non-negligent parties since it places the ultimate intrinsic loss on the independent contractor who furnishes and uses the equipment or material and who would have the best

opportunity to test and replace any such product that might fail while being used in a normal fashion by the contractor aboard a vessel.

For the foregoing reasons, *amici curiae* respectfully submit that the decision of the Court of Appeals should be reversed and that petitioner should be held entitled to recover full indemnity from respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES B. HOWARD, one of counsel for American Merchant Marine Institute, Inc., Pacific American Steamship Association and Lake Carriers' Association, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 19th day of August, 1963, I served copies of the foregoing Brief on counsel for all parties of record by mailing copies of said Brief attached to copies of Motion for Leave to File *Amici Curiae* Brief, in sealed envelopes, deposited in the U. S. mail at Seattle, Washington, with postage prepaid and addressed as follows:

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